(4)

Supreme Court, U.S.
FILED
OCT 23 2000
CLERK

No. 00-456

In the Supreme Court of the United States

STATE OF LOUISIANA,
DEPARTMENT OF NATURAL RESOURCES
Petitioner

VERSUS

ALBERT J. AVENAL, JR., CLARENCE DUPLESSIS, KENNETH A. FOX, FOX OYSTER COMPANY, AND NICK L. SKANSI
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA
and
LOUISIANA COURT OF APPEAL FOR THE FOURTH CIRCUIT

OPPOSITION BRIEF OF RESPONDENTS, ALBERT J. AVENAL, JR., CLARENCE DUPLESSIS, KENNETH A. FOX, FOX OYSTER COMPANY AND NICK SKANSI

WENDELL H. GAUTHIER
SCOTT LABARRE
Gauthier, Downing, LaBarre, Beiser & Dean
3500 North Hullen Street
Metairie, Louisiana 70002
Telephone: (504) 456-8600

MICHAEL X. ST. MARTIN
JOSEPH G. JEVIC, III
St. Martin & Williams
4084 Highway 311
P.O. Box 2017
Houma, Louisiana 70361
Telephone: (504) 876-3819

CAROLYN A. MCNABB
A Professional Law Corporation
8026 Main Street, Suite 520
Houma, Louisiana 70360
Telephone: (504) 876-3885

PHILIP F. COSSICH, JR.
LES A. MARTIN
Cossich, Martin, Sumich & Parisiola
8056 Highway 23
P.O. Box 400
Belle Chasse, Louisiana 70037
Telephone: (504) 394-9000
Counsel for Respondents

Riverside Printing, L.L.C., 4939 Tchoupitoulas, N. O., LA 70115, (504) 897-5000

18pp

QUESTION PRESENTED

Is there a compelling reason to grant certiorari in this case to review a Louisiana appellate court decision which refused to apply collateral estoppel on the basis of its construction and application of Louisiana law?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT.....4

CONCLUSION.....11

TABLE OF AUTHORITIES

Cases **Page**

Avenal v. State, 757 So.2d 1 (La. App. 4 Cir. 2000) 3,8,9

Avenal v. United States, 100 F.2d 933 (Fed. Cir. 1995).....1

Avenal v. State, 2000-1077 (La. 6/23/00), _So.2d_ 3

Bd. of Commissioners v. Missouri Pacific Railroad, 625 So.2d 1070 (La. App. 4 Cir. 1993), *writs denied*, 630 So.2d 802 (La. 1994), *cert. denied,* 512 U.S. 1220, 114 S.Ct. 2707, 129 L.Ed. 2d 835 (1994).....8,9

Braxton v. United States, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed. 2d 385 (1991) 4

Brister v. A.W.I. Inc., 946 F.2d 350 (5th Cir. 1991).....7

Copeland v. Merrill Lynch & Co., Inc., 47 F.3d 1415 (5th Cir. 1995) 3,6,7

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 119 S.Ct. 1961 (1999).....6

Holland v. State, Dept. of Transp., 554 So.2d 727 (La. App. 2 Cir. 1989) *writs denied,* 559 So.2d 125 (La. 1990) 9

Cases **Page**

In re Southmark Corp., 163 F.3d 925 (5th Cir. 1999), *cert. denied*, __U.S._, 119 S.Ct. 2339 (1999).....7

Nations v. Sun Oil Company, 705 F.2d 742 (5th Cir. 1983) 6,7

McMurtray v. Holladay, 11 F.3d 499 (5th Cir. 1993) 2

Metromedia Co. v. Fugazy, 983 F.2d 350 (2nd Cir. 1993), *cert. denied*, 508 U.S. 952, 113 S.Ct. 2445, 124 L. Ed.2d 662 (1993) 7

Parish of East Baton Rouge v. Landrum, 289 So.2d 21 (La. App. 1 Cir. 1973), *writ denied*, 293 So.2d 176 (La. 1974) 9

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L. Ed.2d. 67 (1984) ...1-2

Peterson v. Clark Leasing Corp., 451 F.2d 1291 (9th Cir. 1971).....7

Recoveredge L.P. v. Pentecost, 44 F.3d 1284 (5th Cir. 1995) 7

Reeder v. Succession of Palmer, 623 So.2d 1268 (La. 1993) 6

Southern Pac Transp. Co. v. Smith Material Corp., 616 F.2d 111(5th Cir. 1980) 8

Cases **Page**

State Through Dept. of Highways v. Vermillion Development Co., 249 So.2d 167 (La. 1971) 8,9

State v. Spooner, 520 So.2d 336 (La. 1988) 10

State v. 1971 Green GMC Van, 354 So.2d 479 (La. 1977) 10

Stone v. Entergy Services, Inc., 744 So.2d 141 (La. App. 4 Cir.), *writ denied*, 750 So.2d 989 (La. 1999) 10

Taylor v. Charter Medical Corp., 162 F.3d 827 (5th Cir. 1998) 7

Terrebonne Fuel & Lube v. Placid Refining Co., 666 So.2d 624 (La.1996) 6

Louisiana Constitutional Articles

Art. 1, Section 4 of the 1974 Louisiana Constitution ...1,7,10

Miscellaneous Texts and References

L. Jenkins, *The Declaration of Rights*, 21 LOY.L.REV. 9 (1975).....10

18 Wright, Miller & Cooper, *Federal Practice and Procedure* §4417.....3,7

STATEMENT OF THE CASE

The plaintiffs/respondents are a class of oyster leaseholders who instituted this inverse condemnation action in Louisiana state court against the State of Louisiana, Department of Natural Resources ("the DNR") under Article I, Section 4 of the 1974 Louisiana constitution.[1] They alleged that the DNR's construction and operation of the Caernarvon freshwater diversion structure affected a "taking" of their oyster leases by diverting freshwater from the Mississippi River into Breton Sound (where their leases are located) and lowering the salinity levels there below that necessary to support oyster cultivation.

After five (5) years of pretrial proceedings, and on the eve of a second trial setting, the DNR asked the lower courts to dismiss this action on collateral estoppel grounds by giving preclusive effect to the Federal Circuit's decision in *Avenal v. United States*, 100 F.2d 933 (Fed. Cir. 1995) - an action under the federal constitution decided some three (3) years earlier, and to which the DNR was not a party.[2] The Federal Circuit in *Avenal* affirmed a summary judgment

---

[1] Article I, Section 4 of the 1974 Louisiana Constitution provides, in pertinent part: "Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit."

[2] The DNR argues throughout its petition that the leaseholders, through this state court proceeding, are attempting to have "two bites at the apple." This argument lacks merit. The DNR ignores the fact that the leaseholders were required to proceed in two separate forums. The Eleventh Amendment prohibits suits against states or their agencies like the DNR from being heard in federal court, *Pennhurst State School*

dismissal of the leaseholders' claims against the United States, concluding that 1) the leaseholders "knew" in 1965 that the Caernarvon structure would eventually be built, and 2) the leaseholders also "knew" that the Caernarvon structure, once built, would destroy their oyster leases in Breton Sound. The Federal Circuit then held that this "knowledge" about the Caernarvon structure deprived the leaseholders of any reasonable investment-backed interest in their leases, and defeated their claim for compensation.

On the DNR's motion for summary judgment in this case, the trial court refused to give preclusive affect to the Federal Circuit's decision and denied the motion. The DNR sought supervisory review from the Louisiana Court of Appeal, Fourth Circuit which, on rehearing, affirmed the judgment of the trial court. *Avenal v. State*, 757 So.2d 1 (La. App. 4 Cir. 2000).[3] The court on rehearing held that only

(footnote 2 continued)
& Hosp. v. Halderman, 465 U.S. 89, 98, 104 S.Ct. 900, 906, 79 L. Ed.2d. 67 (1984); *McMurtray v. Holladay,* 11 F.3d 499, 504 (5th Cir. 1993) (11th amendment prohibits takings case against state in federal court), and thus the leaseholders could not have joined the DNR as a defendant in their federal suit; they were required to bring this case in Louisiana state court. Similarly, the federal government could not be made a party to this proceeding because the federal government may only be sued in federal court. The leaseholders therefore had no choice but to proceed simultaneously in state and federal forums.

[3] On original hearing, a five-judge panel of the Fourth Circuit reversed the trial court's judgment and ordered the case dismissed. The majority on original hearing consisted of Judges Waltzer, Gulotta and Ciaccio; Chief Judge Klees and Judge McKay dissented. On rehearing, after additional briefing and oral argument, Judge Ciaccio changed his vote, creating a 3-2 majority to affirm the trial court. Judge Ciaccio wrote a separate concurring opinion to explain why he changed his mind on rehearing.

evidence of bad faith on the part of a leaseholder could defeat a claim for compensation in a takings case under Louisiana law. *Avenal,* 757 So.2d at 12. Thus, as Judge Ciaccio explained in his concurring opinion, leaseholder knowledge of a pending expropriation -- which the Federal Circuit held to be fatal to the federal claims -- did not bar claims for compensation under the Louisiana constitution. *Avenal*, 757 So.2d at 13 (Ciaccio, J. concurring). As amplified below, this conclusion is correct because, under the federal law of issue preclusion, collateral estoppel does not preclude litigation of an issue in a subsequent proceeding unless both the facts and the legal standard used to assess them are the same in both proceedings. *Copeland v. Merrill Lynch & Co., Inc.,* 47 F.3d 1415, 1422 (5th Cir. 1995); 18 Wright, Miller & Cooper, *Federal Practice and Procedure* §4417, at 165. Because the Louisiana appellate court concluded that the Louisiana constitution provided a different and more liberal legal standard than the one applied by the Federal Circuit, it correctly held that collateral estoppel did not apply to this state court proceeding.

The Louisiana Supreme Court denied the DNR's application for supervisory review, *Avenal v. State*, 2000-1077 (La. 6/23/00), _So.2d_ , and the DNR then sought certiorari in this court.

SUMMARY OF ARGUMENT

There is no compelling reason to grant the DNR's application for a writ of certiorari in this case because the lower Louisiana court decision turned exclusively on its interpretation and application of Louisiana law. The DNR

sought dismissal of this state takings action on collateral estoppel grounds on the basis of a prior federal court decision. Federal courts have uniformly recognized that issue preclusion in a subsequent matter through collateral estoppel is inapplicable where the legal standard to be applied in the subsequent matter is different than the one in the initial proceeding. The Louisiana appellate court decision at issue correctly held that, under controlling Louisiana expropriation law, a different legal standard applied to this state court proceeding than was applied in the prior federal proceeding. As a result, the petition presents no issue of federal law and certiorari should be denied.

ARGUMENT

A petition for writ of certiorari will be granted only for compelling reasons. Sup. Ct. R. 10. Such reasons typically consist of conflicting decisions of the federal appellate courts on the same important matter, an important question of federal law that has not been but should be settled by this Court, or a lower court decision on a federal question that conflicts with relevant decisions of this Court. Sup. Ct. R 10 (a) & (c). A principal purpose of certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of federal law. *Braxton v. United States,* 500 U.S. 344, 347, 111 S.Ct. 1854, 1857, 114 L.Ed. 2d 385 (1991). Under these standards, the DNR's petition for a writ of certiorari should be denied because it seeks review of a state appellate court decision applying well-settled principles of state law.

In an effort to suggest otherwise, the DNR's petition

in this court dramatically misrepresents the holding of the Louisiana Fourth Circuit. The DNR contends that the Louisiana Fourth Circuit "ruled that collateral estoppel, whether based on federal common law or any other source of law, would simply not apply in Louisiana." See Petition for Writ of Certiorari, p. 9. The DNR thus alleges that the Louisiana appellate court deliberately failed to consider the applicability of collateral estoppel. This is plainly not correct. Both Judge McKay's majority opinion on rehearing, and Judge Ciaccio's concurring opinion on rehearing explaining why he changed his vote, make clear that their decision was grounded on the conclusion that Louisiana law provided a different legal standard in takings cases than the legal standard utilized by the Federal Circuit. The DNR's contention that the Louisiana Fourth Circuit majority failed to consider whether the Federal Circuit's decision should be given preclusive effect is therefore flatly wrong. The court considered whether collateral estoppel should apply, and expressly concluded that it did not because of the different legal standard provided by state law.

The DNR also attempts to prompt a grant of certiorari in this case by couching its collateral estoppel arguments as ones involving constitutional violations. More specifically, the petitioner raises for the first time in this court the constitutional issues of the Full Faith and Credit clause and the Supremacy clause. See Petition for Writ of Certiorari, p. i.[4]

4 In the "Question Presented" section, the DNR also suggests that the Louisiana appellate court refused to even recognize the preclusive effect of a federal judgment. As noted above, the Louisiana Fourth Circuit did not refuse to consider the preclusive effect of the Federal Court's decision. The court instead considered whether the same legal standard applied and, finding that different standards applied, held collateral estoppel inapplicable.

In the lower courts, however, the DNR never raised these constitutional issues but merely moved for the application of collateral estoppel. This is a significant difference, amounting to a wholly new issue raised the first time in this court. Far from reaching the lofty dimensions of a constitutional violation, collateral estoppel is an equitable doctrine. *Nations v. Sun Oil Company*, 705 F.2d 742, 745 (5th Cir. 1983). Federal courts have long recognized that trial courts have broad discretion in deciding whether to apply collateral estoppel. *Copeland, supra*, 47 F.3d at 1415; *Nations*, 705 F.2d at 744; trial courts have no discretion with respect to constitutional provisions. Whereas the DNR in the Louisiana courts sought the benefit of a discretionary equitable doctrine, it argues in this court that it has been the victim of a constitutional violation. It is well-settled that this court will not consider arguments neither raised nor considered in the lower courts, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 119 S.Ct. 1961, 1968 n. 3 (1999), and this court should therefore disregard the DNR's constitutional arguments and instead consider only whether the lower courts committed an abuse of discretion in refusing to apply collateral estoppel.

The Louisiana Fourth Circuit correctly concluded on rehearing that collateral estoppel did not apply to this case. Louisiana law recognizes that when, as here, a state court is required to determine the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction, it is the federal law of *res judicata* that must be applied. *Terrebonne Fuel & Lube v. Placid Refining Co.*, 666 So.2d 624, 632-3 (La. 1996); *Reeder v. Succession of Palmer*, 623 So.2d 1268, 1271 (La. 1993). This case

involves not *res judicata*, which the federal Fifth Circuit has recognized as a "doctrine of legal right," *Nations, supra,* 705 F.2d at 744, but collateral estoppel.

Federal courts applying collateral estoppel have held that it may be applied to bar the relitigation of a claim, previously decided in another court, "when - but only when - the facts and ***the legal standard used to assess the facts are the same*** in both proceedings." *Taylor v. Charter Medical Corp.*, 162 F.3d 827, 832 (5th Cir. 1998) (emphasis added); see also *In re Southmark Corp.*, 163 F.3d 925, 932 (5th Cir. 1999), *cert. denied*, _U.S._, 119 S.Ct. 2339 (1999); *Copeland, supra*, 47 F.3d at 1422; *Recoveredge L.P. v. Pentecost,* 44 F.3d 1284, 1291 (5th Cir. 1995); *Metromedia Co. v. Fugazy,* 983 F.2d 350, 365 (2nd Cir. 1993), *cert. denied*, 508 U.S. 952, 113 S.Ct. 2445, 124 L. Ed.2d 662 (1993); *Brister v. A. W.I. Inc.,* 946 F.2d 350,354 n.1 (5th Cir. 1991); *Southern Pac Transp. Co. v. Smith Material Corp.,* 616 F.2d 111, 115 (5th Cir. 1980); *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291, 1292 (9th Cir. 1971). As one leading treatise points out, "[c]ourts have readily perceived that for purposes of preclusion, issues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits be the same." 18 Wright, Miller & Cooper, *Federal Practice and Procedure*, §4417, at 165. The foregoing authorities make it abundantly clear that collateral estoppel does not apply when a different legal standard is applicable in the second proceeding.

The issue before the Louisiana Fourth Circuit, therefore, was whether a different legal standard applied to the leaseholders' claims under Article I, Section 4 of the 1974

Louisiana constitution than was applied by the Federal Circuit under the federal constitution. The Fourth Circuit majority on rehearing expressly acknowledged that this was the determinative issue, stating:

"The question central to our analysis of this case is whether the standard for a taking is the same under Louisiana law as it is under federal law and if so whether the plaintiffs' action is barred by collateral estoppel." *Avenal, supra*, 757 So.2d at 10-11.[5] The answer to this "central" question required the Fourth Circuit to construe and apply Louisiana takings law. The court found that a different legal standard applied under Louisiana law, and explicitly rejected the "reasonable investment-backed expectation" test utilized by the Federal Circuit. *Avenal*, 757 So.2d at 12.

The Louisiana Fourth Circuit also concluded that a different legal standard applied under Louisiana law with respect to the issue of leaseholder knowledge. It has long been the law in Louisiana that a leaseholder's knowledge of a pending expropriation did not defeat his claim for compensation unless the leaseholder was guilty of predatory conduct or bad faith. *State Through Dept. of Highways v. Vermillion Development Co.*, 249 So.2d 167, 171 (La. 1971); *Bd. of Commissioners v. Missouri Pacific Railroad*, 625 So.2d 1070, 1076-78 (La. App. 4 Cir. 1993), *writs denied*, 630 So.2d 802-3 (La. 1994), *cert. denied*, 512 U.S.

---

[5] The DNR contends that the Fourth Circuit majority refused to even consider the applicability of collateral estoppel. It is clear that, far from ignoring the question, the Fourth Circuit majority addressed it head on and concluded that collateral estoppel did not apply because a different legal standard applied under Louisiana law.

1220, 114 S.Ct. 2707, 129 L.Ed. 2d 835 (1994); *Holland v. State, Dept. of Transp.*, 554 So.2d 727, 732 (La. App. 2 Cir. 1989), *writs denied*, 559 So.2d 125 (La. 1990); *Parish of East Baton Rouge v. Landrum,* 289 So.2d 215, 217 (La. App. 1 Cir. 1973), *writ denied* 293 So.2d 176 (La. 1974). The Fourth Circuit on rehearing relied on this line of cases in holding that collateral estoppel did not apply. *Avenal, supra*, 757 So.2d at 12.

Judge Ciaccio amplified on the court's decision on rehearing in his concurring opinion, where he wrote:

> I voted to grant a rehearing because my review of our earlier opinion disclosed errors of law that had lead to an erroneous judgment.
>
> ***
>
> In the case of *State, Department of Transportation and Development v. Vermillion Development Co.*, 249 So.2d 167, 258 La. 1159 (La. 1971), our Supreme Court enunciated the principle that knowledge of an anticipated expropriation does not bar a claim for compensation by a lessee of the property in the absence of proof of bad faith, fraudulent or predatory conduct. This rule of law has been uniformly followed in the cases cited in the majority opinion together with the case of *Board of Commissioners v. Missouri Pacific Railroad,* 625 So.2d 1070, 1076-78, (La. App. 4 Cir. 1993), *writs denied,* 630 So.2d 802-3 (La. 1994).
>
> The crux of the dismissal of plaintiff's suit in the Federal Court was the finding that plaintiffs *knowledge* of the pending action of the Corps of Engineers

> and the State of Louisiana prevented them from having a "reasonable investment backed expectation that their oyster leases would give them rights protected from the planned freshwater diversion projects of the state and federal government." **But *prior knowledge* of an anticipated expropriation is not a bar to compensation under Louisiana law.**

Avenal, 757 So.2d at 12-13 (Ciaccio, J., concurring). (emphasis added). As Judge Ciaccio noted, the Louisiana legal standard on this issue is more liberal than the one applied by the Federal Circuit. This conclusion is consistent with prior Louisiana Supreme Court decisions which recognized that Article I, Section 4 of the 1974 Louisiana constitution was intended to give far-reaching new protection to the rights of Louisiana citizens to own and control property. *State v. 1971 Green GMC Van*, 354 So.2d 479, 486 (La. 1977); *State v. Spooner*, 520 So.2d 336, 345 (La. 1988). Its language goes beyond other state constitutions and the federal constitution in limiting the power of government to regulate private property. *1971 Green GMC Van, supra*; L. Jenkins, *The Declaration of Rights*, 21 LOY.L.REV. 9, 19 (1975).[6]

---

[6] The DNR's claim that the Fourth Circuit decision on rehearing conflicts with other Louisiana Fourth Circuit decisions – specifically, *Stone v. Entergy Services, Inc.*, 744 So.2d 141 (La. App. 4 Cir.), writ denied, 750 So.2d 989 (La. 1999) – is palpably incorrect. In *Stone*, the Fourth Circuit held that a prior federal judgment did not preclude a subsequent state court suit between the same parties because the federal judge expressly stated that the state claim would have to be decided in state court. 744 So.2d at 143. *Stone* is fully consistent with the Fourth Circuit's decision on rehearing in this case, which also refused to preclude a subsequent state court suit, and both opinions were authored by Judge McKay.

It is therefore clear that the Louisiana Fourth Circuit majority refused on rehearing to apply collateral estoppel on the basis of its construction of Louisiana law. Its conclusion that the Louisiana legal standard was different than the standard applied by the Federal Circuit precludes collateral estoppel under federal precedents. The DNR's petition therefore raises no federal issue.

CONCLUSION

The DNR asks this court to review a Louisiana appellate court's interpretation of Louisiana law. Under Rule 10 of this Court, there is no compelling reason for granting certiorari and the DNR's petition should be denied.

DATE: 10/19/00

RESPECTFULLY SUBMITTED,

BY: _____

WENDELL H. GAUTHIER (Bar No. 5984)
SCOTT LaBARRE (Bar No. 17659)
GAUTHIER, DOWNING, LABARRE,
BEISER & DEAN
3500 North Hullen Street
Metairie, Louisiana 70002
Phone: (504) 456-8600

MICHAEL ST. MARTIN (Bar No. 12365)
JOSEPH G. JEVIC, III (Bar No. 23145)

ST. MARTIN & WILLIAMS
4084 Highway 311
Post Office Box 2017
Houma, Louisiana 70361-2017
Phone: (504) 876-3891

CAROLYN MCNABB, P.L.C.
(Bar No. 18734)
8026 Main Street, Suite 520
Houma, Louisiana 70360
Phone: (504) 876-3885

PHILIP F. COSSICH (Bar No. 1788)
LES MARTIN (Bar No. 22504)
COSSICH, SUMICH, MARTIN
& PARISIOLA
Suite 200, 8056 Highway 23
P.O. Box 400
Belle Chasse, Louisiana 70037
Phone: (504) 394-9000
ATTORNEYS FOR
PLAINTIFFS/RESPONDENTS